

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ARNOLD I. KLAYMAN

Appeal No. 2000-0543
Application No. 29/066,640¹

ON BRIEF

Before KRASS, STAAB, and PAK, Administrative Patent Judges.

KRASS, Administrative Patent Judge.

DECISION ON APPEAL

This design application is on appeal from the final rejection of the only claim pending.

¹ Application for patent filed February 18, 1997.

The subject matter of the invention is the design for a speaker and is directed to the design shown in Figures 7 through 12, which have been relabeled 1 through 6. The designs depicted in original Figures 1 through 6 and 13 through 16 were withdrawn as being directed to nonelected inventions.

Appellant appeals from the final rejection of the following design claim:

The ornamental design for a speaker, as shown and described.

The examiner relies on the following reference:

Wright	1,894,605	Jan. 17,
1933		

The claim stands rejected under 35 U.S.C. 102(b) as anticipated by Wright, specifically Figure 4 of Wright.

Reference is made to the briefs and answer for the respective positions of appellant and the examiner.

OPINION

We reverse.

In order to establish an anticipation, under 35 U.S.C. 102, of a claimed design, the examiner must demonstrate that a prior art reference describes subject matter which is identical in all material aspects of the claimed design. Hupp v. Siroflex of America Inc., 122 F.3d 1456, 1459, 43USPQ2d 1887, 1890 (Fed. Cir. 1997).

Accordingly, we look to the sameness between the toy block design of Wright and the speaker design of the instant invention in order to determine the appropriateness of the examiner's rejection under 35 U.S.C. 102.

We do not view the speaker design of the instant invention and the toy block design of Wright to be identical in all material aspects because the feet depicted on the former are a material part of the claimed design whereas the toy block design of Wright has no such feet. The examiner may not consider these feet to be "material" but we disagree. The examiner calls the difference in feet to be "*de minimus*" in

nature and one which does not provide an overall appearance that is patentably distinct over the prior art. Thus, the examiner admits to a difference but makes the rejection under 35 U.S.C. 102, rather than 103.

In the instant case, the toy block design of Wright cannot anticipate the instant claimed design since the former does not depict the feet which form part of the latter's design, which we regard as a material aspect of the claimed design.

While we need not reach the "analogous art" issue since it is our view that Wright fails to disclose all of the elements of the claimed design in any event, we would note that the question of whether or not a prior art reference is nonanalogous art is simply not germane in cases of a design claim, or, for that matter, of a utility claim, which has been rejected as being anticipated under 35 U.S.C. 102. Either the reference discloses all that is claimed, or it does not. The question of nonanalogous art has a bearing on the issue of obviousness under 35 U.S.C. 103 but we do not have such an issue before us.

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LAWRENCE J. STAAB
Administrative Patent Judge

CHUNG K. PAK
Administrative Patent Judge

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